The Principles of Copyright

Two independent rights arise from the creation of an artwork; one pertains to the artwork in its material form, the other to its copyright, that is the right to reproduce or publish or broadcast it. Each right is valuable and has a separate value quite independent of the other. Each may be sold or otherwise disposed of quite independently of the other. Accordingly the two rights may be in separate ownership. The owner of the copyright in an artwork will normally be its creator, the visual artist. That artist has a professional responsibility to him or herself to understand the principles of copyright law. This chapter provides basic guidance.

INTRODUCTION

Few professional art practitioners and administrators sufficiently understand the law of copyright. Yet it is one of the most potentially valuable aspects of their industry. A 1987 study determined that the Australian copyright based industries were directly responsible for $7.405 billion (of value-added worth) in 1985/1986, or 3.1 per cent of the gross domestic product. The estimated production value of the copyright based industries (including items such as raw material, fuel, power and other goods and services) was a staggering $12.81 billion. Artistic works were directly responsible for $260 million of this and when their spin-off effects were added, this sum was $4.41 billion: Guldberg and Candi, “Copyright -- An Economic Perspective” (Australian Copyright Council, 1987).

The law of copyright is very complex and arts practitioners may be forgiven for not tackling it; indeed very few lawyers are competent in it. On the other hand it is essential that those working in the arts have at least a basic understanding of the rules affecting this most valuable resource if they are to optimise their income from work.

Copyright protection is accorded to two classes of things:

* `works'' (including artistic, musical, literary, and dramatic works);
* `things other than works'' (such as sound recordings, films, and published editions).

In this chapter, only artistic works will be discussed.

Copyright is sometimes called “intellectual property”. This phrase is used to emphasise that it is something that exists independently of the ownership of the physical artwork. For example, if a sculptor sells a piece to a collector she does not necessarily sell the copyright too. She may choose to sell the copyright, but that is a matter for specific and separate agreement between the parties. Even after the work is sold, if copyright is retained, the artist is entitled to reproduce the work although the original is owned by someone else. This is because the right to reproduce is one of the rights exclusively enjoyed by the copyright owner.

Copyright protection in Australia is wholly statutory. It is provided by the Copyright Act 1968 (Cth).

Copyright is a very complicated legal area and to some extent it is inevitable that the material that follows reflects that complexity. (Part of this difficulty arises from the need to continually ask oneself whether or not the work in question was created before or after 1 May 1969. This is because the present Copyright Act came into force on that date and, in so doing, introduced many changes to the law.)

1. The Rights of Copyright

The owner of the copyright in an artistic work has the exclusive right to:

* reproduce the work in material form;
* publish the work;
* include the work in a television broadcast;
* cause a television programme that includes the work, to be transmitted to subscribers to a diffusion service (cable): s. 31(1)(b).
(a) The right to reproduce

This is the right to copy. For example, taking a sketch by another and without permission printing it on tee-shirts, is an infringement of the artist/copyright owner's exclusive right of reproduction.
It is important to note that a two-dimensional work is deemed to have been reproduced if a three-dimensional version is made of it, and vice-versa: s. 21(3).

(b) The right to publish

The publication of an artistic work, for copyright purposes, means that reproductions of the work have been supplied (by sale or otherwise) to the public: s. 29(1).
Exhibition does not amount to publication. Nor does the selling of photographs or engravings of a sculpture constitute publication of the sculpture: s. 29(3). This is rather extraordinary for the selling of photographs or engravings of a drawing, painting or craftwork would constitute publication.

(c) The right to broadcast

The right is limited by s. 67 which states that no infringement occurs by the work's inclusion in a film or broadcast if its inclusion "is only incidental to the principal matters represented in the film or broadcast". Thus, it would not be an infringement to broadcast an interview in which the subject was sitting in front of a copyright artwork; nor where the work was part of a film set. It would be perhaps otherwise, if the artwork was a feature of the film or broadcast, such as the repetitious reference to a painting of Ayers Rock in an advertisement, or the painting used in the film of "The Picture of Dorian Gray".

2. Conditions for the Subsistence of Copyright
An artist does not have to do anything formal in order to receive the protection of copyright. From the moment of its creation, a work will be the subject of copyright if:

* it has been reduced to a "material form";
* it is an "artistic work";
* the artist is a "qualified person"; and
* the work is "original".

Each of these requirements needs some explanation.

(a) Material form

For a work to be protected by copyright it must have a "material form" because copyright does not protect ideas, but rather, the physical expression of those ideas. Thus the idea of painting a can of soup is not protected, but a painting of it would be.

This requirement presents little problem to most visual artists, but conceptual artists face unusual difficulties. By the very nature of their artform, many conceptual works are not reduced to a material form and therefore do not enjoy copyright protection. Such artists should be careful to document the piece by words and diagrams. Copyright would then be able to subsist in the work as embodied in the material form.

It is not vital that the material form be permanent. Thus if a work, such as Dobell's "Joshua Smith" or Sutherland's portrait of Sir Winston Churchill is destroyed, the copyright will continue to protect the exclusivity of the reproduction rights. Nevertheless, the question of when a form is sufficiently substantive to qualify as "material" is one of the current brain teasers of copyright. For example, is a vapour sculpture (made by an artist using a jet engine) "material"? Some would say not because it is insufficiently substantial. But what of an ice sculpture? It employs the same substances but lasts slightly longer. All would surely say yes. What then is the difference? Merely the length of time that the work exists? There is no logic to that approach. Perhaps the fact that one can be touched but not the other? Again there is little to recommend that view.
The problem of materialness also arises with holograms and laser light sculptures. The eye sees the work but the hand cannot feel it, yet, with a movement, the hand can destroy it. The work in any traditional sense exists only in the eye of the individual viewer.

At the moment, the strongest view is probably that the artistic work must be visible to the eye before one can describe it as having a material form, but perhaps the debate on the nature of "materialness" is more suited to the Sceptic philosophers than copyright lawyers.

(b) Artistic work

The Copyright Act defines "artistic work" as follows:
"(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
(b) a building or a model of a building, whether the building or model is of artistic quality or not; or
(c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies": s. 10.

The Act also provides that a "drawing" includes a diagram, map, chart or plan. An "engraving" includes an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph. "Photograph" means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography. "Sculpture" includes a cast or model made for the purposes of sculpture.

There is no statutory definition of "artistic craftsmanship". However, while the courts have been unable to reach a consensus, some principles may be gleaned from the cases.
The "artistic" quality of the craft work is gauged by looking at the intention of the artisan and asking whether the main object of creating the piece, albeit utilitarian, was that it should have a "substantial appeal to the taste of those who observe it": Cuisenaire v. Reed [1963] V.R. 719.

"The emphasis is thus upon the object of the author in creating the work, rather than on the reaction of the viewer to the completed work, for it is commonplace in copyright law that it is immaterial whether the work has any merit": Walker v. Lane [1980] A.C. 539 at 549.

The work must also be one of "craftsmanship"; something demanding a particular skill or training. In the Cuisenaire case, it was alleged that the defendant was breaching the plaintiff's copyright in an educational tool for the teaching of arithmetic. The "material form" consisted of small wooden rectangular blocks that were variously coloured. The court held that no copyright existed in the blocks because (a) they were not works of "craftsmanship" in that no special skill or training was necessary to cut out simple shapes of wood, and (b) they were not intended to be "artistic". "Artistic quality" is only relevant to the makers of craft. With paintings, drawings, engravings and photographs the work need be neither skilful nor artistic.

(c) Qualified person

Even if a work has "material form" and is an "artistic work", in order to attract copyright protection it must have been created by a "qualified person". Who is such a person can be a complicated legal question but it is not one which will concern the majority of readers; anyone who is either a citizen of or a resident of Australia is a "qualified person".

The work of those who are neither citizens nor residents will nevertheless often come within the statutory categories of protected material. In considering this, three variables must be taken into account: (a) whether the work was made before or after 1 May 1969; (b) whether the work is published or unpublished and (c) whether a pre 1969 work was...
published before or after 1969. (Note that "published" means that reproductions of the work have been supplied to the public: s. 29(1).) In general, any reader in doubt as to his or her position would be well advised to seek advice either from a legal practitioner or from the Australian Copyright Council.

(d) Originality

Irrespective of the date of its creation, an artwork must be "original" if it is to be protected by copyright. This does not mean that the idea behind the work must be novel, for copyright does not protect ideas but rather the material form in which those ideas are expressed: see *Sands & McDougall Pty Ltd v. Robinson* (1917) 23 C.L.R. 49; *Mander v. O’Brien* [1934] S.A.S.R. 87 at 91. Thus, in the unlikely event that two artists working absolutely independently produced identical works, both would be "original" for the purposes of the Act and both would be capable of attracting copyright protection. For example, if two artists independently paint a picture of the Sydney Opera House and by some extraordinary chance produce identical images, both works would be protected. This is because the "originality" of the works flows from the independent application of skill by their authors: see *Krisarts S.A. v. Briarfine Ltd* (1977) 3 F.S.R. 557 at 562. The amount of skill, labour and experience necessary is not defined in the Act or the cases, but one authority has suggested that it must be more than "negligible": *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273 at 287.

"Originality" is always a question of degree. It is not merely a matter of "changing a line here or there". If a person copies a substantial part of another artist's work, but changes the odd line or colour, the latter may still be able to show a causational link between the works and thus establish that the copyright of the original piece has been infringed.

In the 1981 Archibald Prize competition, considerable controversy arose when it was discovered that the winner, Eric Smith, had painted the Komon portrait from a photograph. Leaving aside the issue of the priority of the award in such circumstances, it is interesting to note that the painting could breach the copyright in the photograph
(unless the artist had obtained a licence to use the photograph in this way), and thus expose the artist to a potential claim for damages. This, however, does not prevent the portrait from attracting copyright protection in its own right. Although the artist used the photographic image as the basis of his painted work, he clearly used considerable skill, labour and experience in its production. The exercise of these personal attributes was sufficient to make the work “original”. Strictly, there is no reason why a work cannot be both an infringement of the copyright in an earlier work, and, at the same time, an original work in its own right.

3. Ownership of Copyright

As a general rule, the “author” of an artistic work owns the copyright in a work: s. 35(2). The Act does not define “author” (except with regard to photographs) but the cases show that the “author” is the person who gives form to the creative idea. It is not necessarily the person who thought of the idea, rather, it is the person who transformed that idea into an artwork: *Kenrick v. Lawrence & Co.* [1890] Q.B.D. 99. Although the idea cannot be protected by copyright, its expression is.

(a) Photographs

In the case of photographs taken prior to 1 May 1969, the copyright vests in the person who owned the material on which the photograph was taken: s. 208. However, if the photograph was taken after that date, the owner of the copyright is the person who took the image: s. 10, and see also *Pacific Film Laboratories Pty Ltd v. Commissioner of Taxation (Cth)* (1970) 121 C.L.R. 154. If the photograph was a commissioned work, see para. (c).

(b) Joint authorship

Joint authorship exists where an artwork “has been produced by the collaboration of two or more authors and (is one) in which the contribution of each author is not separate from the contribution of the other author”: s. 10. Thus if two or more people design a mural
they would be joint authors and would share the copyright in the work. However the person who thought up the theme of the mural or the very idea of painting the mural in the first place, would not enjoy the copyright unless he or she had also been one of the artists responsible for actually painting the image.

(c) Commissions

Even with commissions, the general rule applies and the author of the work owns the copyright.

By way of exception, if a person commissions an artist to either take a photograph, draw or paint a portrait, or make an engraving, the copyright in the work is owned by the commissioning party: ss 35(5), 213(5). This is important because although the artist may not own the copyright he or she normally retains ownership of the materials by which the image was produced (e.g. the film, plates, moulds or preliminary drawings). If the artist uses this material to make copies for his or her own purposes, an infringement of copyright will have been committed and the copyright owner may sue for damages and to restrain the breach.

If, however, at the time of entering the contract, that person makes known to the artist the purpose for which the work is required, the artist can restrain the commissioner from doing any act covered by copyright that is beyond the declared purpose. For example, if a manufacturer commissions an artist to paint a portrait of the Princess of Wales for the express purpose of putting it on a biscuit tin lid, the company may be restrained from reproducing the image on postcards. This is on the basis that the artist has agreed to create a work for a specific purpose. This "purpose" exception applies only to works created pursuant to agreements made after 1 May 1969.

(i) The definition of portrait
The Act contains no definition of "portrait", and although this may be surprising to artists, the courts have not really defined it either. An example of the problem that this causes was provided by the extraordinary English case of *Leah v. Two Worlds Publishing Co. Ltd* [1951] 1 Ch. 393, in which a father asked an artist to paint a likeness of his dead son -- by means of extra-sensory perception. In a subsequent law suit brought by the artist against the publisher of a periodical entitled Two Worlds for the infringement of his copyright, the judge held as follows:

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`Engraving, photograph or portrait' is a curious collocation of words: one would have expected the third word in that grouping to be something like `painting', because engraving is a method of production, and so is photography; and it would seem that `portrait' covers all kinds of pictorial representation, however produced. I am not sure that it is necessary to express a concluded view about the matter, but I should have thought that on the whole this was a portrait, a portrait produced by the mental process of the artist, and intended to represent a deceased person as that person was when living; and that it is none the less a portrait because the materials that the artist used were entirely subjective": [1951] 1 Ch. 393 at 398-399.
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The definitional problem also arose in the famous case of *Attorney- General v. Trustees of National Art Gallery of New South Wales and Dobell* (1945) 62 W.N. (N.S.W.) 212. In this action an injunction was sought, restraining the New South Wales trustees from paying the 1943 Archibald Prize monies to Dobell. Also sought was an order requiring the trustees to carry out the terms of the trust. Obviously, this was not a copyright case, but nevertheless it did focus upon the definition of a portrait. The following is an extract from Roper J.'s judgment:

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The word is an ordinary word of the English language and its meaning has to be ascertained accordingly. `This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence': per Jordan C.J. in *The Australian Gas Light Co. v. Valuer-General* (1940) 40 S.R. (N.S.W.) 126. From the context in which it is used it is clear that the
testator was referring only to a particular type of portrait namely one of a human being and painted by an artist. Considered alone the word has a wider meaning and would include certain forms of sculpture, certain types of photographs and certain other methods of representation all of which the testator has himself excluded and which require no further consideration.

With the assistance of dictionaries and the many works to which I have been referred by counsel in this case, I think that the word `portrait' as used in this will, incorporating in its meaning the limitations imposed by its context, means a pictorial representation of a person, painted by an artist. This definition connotes that some degree of likeness is essential and for the purpose of achieving it the inclusion of the fact of the subject is desirable and perhaps also essential.

The picture in question is characterised by some startling exaggeration and distortion clearly intended by the artist, his technique being too brilliant to admit of any other conclusion. It bears, nevertheless, a strong degree of likeness to the subject and is I think, undoubtedly, a pictorial representation of him. I find as a fact that it is a portrait, within the meaning of the word in this will, and consequently the trustees did not err in admitting it to the competition."

Further, his Honour refused to state an opinion on the claim that the work was a `caricature' or a `fantasy'. He said, `If it could be so classed that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it (the work) is in any event properly classed as a portrait": (1945) 62 W.N. (N.S.W.) 212 at 215.

One learned commentator has suggested that `a portrait is any painting or drawing, the principal purpose of which is in the representation of a person or animal in whatever style of artistic expression": Lahore, Intellectual Property Law in Australia (Butterworths, Sydney, 1988), para. 3.8.60.

(d) Where artist is under a contract of service or apprenticeship
(i) Post 1 May 1969
Where a work was created under a contract of service or apprenticeship, the artist's employer owns the copyright in any work done by the artist pursuant to that contract. This is particularly important for commercial artists who are employed to create artworks. Had Andy Warhol painted his soup can in the course of his employment with an advertising agency, the copyright in it would have vested in his employer and the artist would have made nothing from the thousands of reproductions that were made of the work: s. 35(6). In contrast, if an artist creates a work in his or her own time, outside the scope of employment, the copyright would vest in the artist.

Where the artist is employed by a newspaper, magazine or other periodical, part of the copyright in the work produced for publication vests in the proprietor of the newspaper/periodical. However, the proprietor only owns the copyright insofar as it relates to publication of the work in any newspaper, magazine or periodical; broadcasting the work; or reproduction of the work for the purpose of it being so published or broadcast, but not otherwise: s. 35(4). That is to say, the copyright is divided between the proprietor and the artist: the proprietor has the exclusive right to do the things listed above, while the artist enjoys all the other benefits of the copyright. Thus, a latter-day Norman Rockwell who has been employed to paint a magazine cover would still be able to make limited editions of the work, or sell a licence to reproduce the image on matchboxes, curtaining and cake tins, but the artist could not permit its use in a magazine. That right would be maintained by the proprietor of the publication.

(ii) Pre 1 May 1969
If the work was created before 1 May 1969 the situation is quite different. In these cases the proprietor owns the whole copyright. But the artist can restrain the owner from using the work in any way other than publication in a newspaper, magazine or similar periodical. The artist has no right to use the material in any way. Rather, he or she has the right to supervise and limit the use made of it by the proprietor: see Sun Newspapers Ltd v. Whippie (1928) 28 S.R. (N.S.W.) 473, another "Ginger Meggs" case.
(e) The impact of contract

The statutory provisions as to the ownership of copyright are all subject to amendment by contract. If an artist enjoys a sufficiently powerful bargaining position he or she may demand from the employer or commissioner that the copyright remain that of the artist except for very limited and closely defined purposes. Similarly, and more probably, an employer or commissioner may demand that the artist sign a contract forsaking a wider range of rights than those conferred by the Copyright Act.

The Act provides a minimum protection to artists and its shield should not be waived lightly. Thus artists must attempt to remove any contractual clause which will diminish the protection of their copyrights.

4. Duration of Copyright in Artistic Works

As a general rule, copyright subsists in an artistic work for the life of its author plus 50 years. The extension period is calculated from the end of the calendar year in which the author died to the end of the fiftieth year: s. 33.

There are five exceptions to this:

(a) Photographs

(i) Taken before 1 May 1969
The copyright continues to subsist in such photographs for 50 years. This extension period is calculated from the end of the calendar year in which the photo was taken: s. 212.

(ii) Taken after 1 May 1969
Photographs taken after this date also enjoy a 50-year copyright period, but the time runs from the end of the calendar year in which the photo was first published: s. 33(6). The date
of the photographer's death is irrelevant to the calculation of the copyright period. Thus where a photo is never published the copyright will subsist indefinitely.

(b) Engravings

If the engraving was published during the lifetime of its author, the usual period (author's life plus 50 years) applies. But if the work is first published posthumously, the copyright period will last for 50 years from the end of the calendar year in which the work is first published: s. 33(3). Consequently, if the work is never published, the copyright will continue to subsist in perpetuity.

(c) Anonymous or pseudonymous works

The copyright in any artistic work that was first published anonymously or pseudonymously (other than a photograph), subsists for 50 years after the end of the calendar year in which the work was first published: s. 34(1). However, if the artist's identity is generally known or could be ascertained by reasonable inquiry, the general rule applies: s. 34(2).

(d) Works of joint authorship

Where the work is of joint authorship and is published during the life of the last surviving author, the 50 year period runs from the end of the calendar year in which that last surviving author dies: ss 80, 33(3). Where the work is posthumously published, the copyright subsists for 50 years from the end of the calendar year in which the work was first published.

Where one or some (but not all) of the joint authors uses a pseudonym, the 50 year period runs from the end of the calendar year in which the last author, whose identity has been revealed, dies.
Similarly, where all of them use pseudonyms, if at any time within 50 years of publication the identity of one of the authors is or could be ascertained, the period runs from the end of the year in which the author, whose identity has been revealed, dies: s. 81.

(e) Published editions of artistic works

There is no copyright in editions published before 1 May 1969: s. 224. Editions published after that date enjoy copyright protection for 25 years from the expiration of the calendar year in which the work was first published: s. 96.

5. Dealing with Copyright

Copyright is personal property. Therefore it can be sold, licensed out, or even left in one's will.

There is a commonly held belief that when artists sell their work they automatically sell their copyright in the work. This is absolutely wrong. The assignment of copyright must be in writing and that writing must be signed by the artist. Nothing less will do: s. 196(3).

(a) The assignment of copyright

The assignment of copyright is quite different from the licence of copyright. When one assigns a right, the whole legal control of that right passes to the assignee. It is like selling that right. In contrast, with a licence, the copyright owner gives another person permission to use the right in a particular way but always retains ownership and thus a certain control over the right.

It is not necessary to assign the whole copyright in a work. The assignment may be limited to:

* one or more of the exclusive rights of copyright or part of them;
* a specified place in Australia, or other part of the world; or
a specific length of time.

Once one assigns one of these rights, it is forever lost. Thus one should sell only those rights that the purchaser really needs -- and is willing to pay for. As an assignment of any part of the copyright must be in writing, one should be very careful to ensure that the document transfers only the minimum essential rights. For example, if a painter sells the copyright in an image, the new copyright owner can produce reproductions of the work, include it in books or magazines, use it on television, all without any supervision from the artist. The use to which the copyright is put may be quite repugnant to the political, moral, religious or aesthetic principles of the artist. The quality of the reproductions, the degree of respect accorded the work and the artist, the sort of book in which the work is included, the purpose for which it is featured in a television programme, all may reflect upon the work and its artist. Thus artists who assign their copyright must carefully assess whether the assignee is to be trusted with such valuable rights, whether they are being asked to assign more than is actually necessary, and whether the assignment is in their financial and professional interests. In the past, institutions dealing with copyright have tended to adopt a rather heavy hand in this regard and have used their considerable power to acquire assignments of copyright. After all if the museum owns the copyright the administrator does not have to think twice about reproducing the work or allowing others to use it, let alone have to go through the tedious process of asking permission of the "author".

Thus for many years it was common museum practice for all contracts relating to the purchase of works to contain a clause by which the vendor was required to assign the copyright at the same time as the work itself was purchased. It was not that the museum had need of the extra rights, it was simply administratively easier.

Two things have changed: first, authors have become more aware of their rights, and in particular the value of their copyrights. In this the age of merchandising, the subsidiary rights have become often more valuable than the traditional property rights. Secondly, the skill and professionalism of administrators has improved. The registrars of collections are
employed for their administrative expertise and not for any less honourable or more esoteric reason. It is not beyond the skill of these people (assisted by computer technology) to develop systems which readily disclose the copyright status of any particular work in the collection.

These two changes have meant that authors are more resistant to parting with all control of their copyright and that museums are quite capable of fulfilling their needs by means of licences.

(b) Licensing the rights

When a copyright owner grants a licence, he or she permits another to use the right but retains ownership and thus a certain control over that right. Because of this tighter control, licences are a much safer way for artists to deal with the copyright in their work. Like assignments, licences are divisible and artists should ensure that the licence they grant is properly limited to the real needs of the licensee. Whenever artists are asked to assign or license their copyright in a work they should always ask: "Does this person need all of these rights or just some of them? Am I being adequately compensated for the loss of these rights?"

In this, the following checklist will be of assistance:

* Should the licence be exclusive or non-exclusive? In other words does it really matter if other people also have the right to use the same material? Only exclusive licences have to be in writing.
* For how long does the licensee need the rights? If the art museum wants to reproduce a design on tee-shirts to publicise a particular exhibition, it will not need the right to reproduce the design after the exhibition has closed.
* In which media should the use be permitted? If the permission sought is, say, reproduction on tee-shirts, the licence should be restricted to that. If the licensee also
wishes to put the image on posters, glasses and biscuit tin lids then the licence should reflect the wider use.

* To what geographical area should the licence apply? How often does an Australian licensee truly need world rights? It may need world rights for the reproduction of a work in a book that is to be sold world-wide. But in that case it would only require non-exclusive book rights. Acquiring those would allow the licensee to do what is needed and yet still allows the copyright owner to exploit the work in other ways.

(c) Payment

Copyright is a valuable thing. It should be paid for. There are three basic ways that this is structured: an outright fee; a royalty; a fee and a royalty.

The outright fee is the easiest but has its drawbacks. The biggest disadvantage of the straight fee is that no-one can really know at the outset of a transaction how much the rights are worth. For example, the value of the right to reproduce photographs in a book will vary wildly depending on the likely sales of the book. On the other hand, when dealing with licensees who are perhaps unknown quantities or whose intended use will be hard to audit, it may be better to adopt an outright fee rather than take the risk of getting a percentage of nothing.

A royalty is a common method of profit participation. If one makes money, both make money. However it works only so long as the person doing the arithmetic can be trusted and/or the arithmetic can be checked. Thus, tee-shirt distributors are notorious for their rubbery sums whereas most large publishing companies have accountants who can add up and have methods of accounting that are easily subjected to audit.

Increasingly common is the payment of a fee plus a royalty. In this way the copyright owner gets an upfront fee for the usage and a royalty on the proceeds. Here, the questions are two-fold:
* Is the fee returnable in any circumstances? It should not be.
* Is the fee recoupable? (In other words, is it merely an advance against future royalties?)
There is nothing wrong with this, but the answer is important for the purpose of working out whether or not the deal is a fair one.

It need hardly be said that when dealing with royalties one should always calculate on gross figures and never net. The point is commercial rather than legal but many people have gone broke on 50 per cent of net when they would have made a fortune out of 12 per cent of gross.

6. Infringement

The infringement of copyright may be of two kinds:

(a) Direct. This occurs when, without authority, a person does or authorises the doing of any act that is within the exclusive right of the copyright owner; namely, the right to reproduce, publish or broadcast the work.
(b) Indirect. This includes the importation of infringing articles into Australia for trade purposes and the dealing with infringing articles for the purposes of trade: ss 37,

Where the infringement is direct, the defendant’s knowledge or ignorance of the breach is irrelevant. But where the infringement is indirect, guilty knowledge (either actual or constructive) must be shown.

(a) Infringement by reproduction

To establish that a copyright has been infringed by the making of a reproduction of the work, or a substantial part of it, it is necessary to prove that the later work is causally connected with the work of the original author: Francis Day & Hunter Ltd v. Bron [1963] Ch. 587. If it is an independent work, no matter how similar, there is no infringement:
Ladbroke (Football) Ltd v. William Hill (Football) Ltd [1964] 1 W.L.R. 273. The derivation may be either direct or indirect, conscious or subconscious.

Although the objective similarity of the works is usually not sufficient in itself to establish the causal connection, it is certainly prima facie evidence of derivation: Francis Day & Hunter Ltd v. Bron [1963] Ch. 587. In the absence of other evidence, conspicuous similarity will fairly lead to the conclusion that there was copying: Oscar Trade Marks (1980) F.S.R. 429. (As to burden of proof, see L.B. (Plastics) Ltd v. Swish Products Ltd (1979) F.S.R. 145.) Further, it is often important to show that the defendant could have had access to the copyright work because this is one factor that may indicate that the similarity is not due to mere coincidence.

To constitute an infringement, it is not necessary that the whole of a work be reproduced. It is an infringement to reproduce a substantial part of the copyright original. The reported cases do not give much guidance as to what will constitute a ``substantial part'' and it is always difficult to predict whether or not the court will consider a reproduction to involve a ``substantial part'' of the original work.

Moreover, considerable problems may arise when two artists tackle age old themes or subjects. In an English case concerning postcards, the judge said:

“When one is considering a view of a very well known subject like the Houses of Parliament with Westminster Bridge and part of the Embankment in the foreground, the features in which copyright is going to subsist are very often the choice of viewpoint, the exact balance of foreground features or features in the middle ground and features in the far ground, the figures which are introduced, possibly in the case of a river scene the craft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution”: Krisarts S.A. v. Briarfine Ltd (trading as Lenton Publications) (1977) F.S.R. 557.
As it was put by another judge, the problem ``must be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether, keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original of the design -- having adopted its essential features and substance: Hanfstaengl v. H. R. Baines & Co. [1895] A.C. 20 at 30-31.

By way of example, when Marcel Duchamp created ``L.H.O.O.Q.'' he pencilled a moustache and goatee onto a reproduction of the ``Mona Lisa''. Had the earlier work still been subject to copyright, there is no doubt that the later one would have amounted to an infringement.

Infringement may occur when a work is reproduced in the same dimension and the same medium (e.g. where a drawing is done of a drawing), in the same dimension but a different medium (e.g. a photograph of a painting), or in a different dimension (e.g. a sculpture made from a painting).

7. Uses That Do Not Constitute Infringement

The Copyright Act provides for a number of situations in which reproduction of a work will not constitute an infringement of copyright. The most important of these are as follows.

(a) Similar works by the same artist

The reproduction right is that of the copyright owner. Thus if the artist sells or assigns the copyright, he or she cannot later reproduce the earlier work. (In the case of a licence having been granted, the right to make later reproductions will depend on the terms of that licence.) Obviously there will be many similarities between different works of the same artist, be it due to characteristic style or theme. However, the artist may reproduce
part of the earlier work in a later work, and may use a mould, cast, sketch, plan, model or study for the purposes of the earlier work, so long as the ``main design'' of the earlier work is not ``repeated or imitated'': s. 72. In other words, it must be a new work, not a copy. Again, that is a matter of degree.

(b) The taking of photographs in an art museum

Most museums forbid the taking of photographs inside the museum. Besides the conservation problems caused by flash bulbs, the photographer runs the risk of falling foul of the copyright laws. Each time the photographer shoots a copyright work, the odds are that copyright will be infringed. The Act provides no special exceptions in relation to works held in public collections.

The most important (and misunderstood) exception to this is that works of ``artistic craftsmanship'' and sculpture, permanently situated in a public place, may be photographed, sketched, painted, or engraved without infringing copyright. This exception does not extend to other artistic works. This leads to the ridiculous situation in which a photographer may shoot a sculpture that is permanently situated in a public place, but may not photograph an adjacent sculpture by the same artist that is merely temporarily positioned, nor the working drawing for the sculpture hanging nearby. With distinctions like this to be made, it is little wonder that careful museum administrators ban the taking of photographs except under the most careful supervision.

(c) Incidental use for film or television

No infringement occurs if an artistic work is reproduced on film or television if that reproduction ``is only incidental to the principal matters represented in the film or broadcast''. As to what is ``incidental'', that is a matter of fact and degree and will differ in each case.
For example, there is usually no copyright problem in allowing a film crew to use museum premises as a set. It may of course be different if the film was "The Picture of Dorian Gray" and that portrait was held in the museum collection.

Similarly, in most cases the filming of interviews in front of copyright works holds no problems, for usually this is either only an incidental use or would be covered by other exceptions.

(d) Fair dealing

This covers the use of artistic, literary, dramatic and musical works for the following purposes:

* research or study;
* criticism or review (although sufficient acknowledgment must be made); and reporting news in a newspaper, magazine, film or television broadcast (although in the case of the print medium, sufficient acknowledgment must be made).

To determine whether or not a dealing is "fair", regard is had to several factors:

* the purpose and the character of the dealing;
* the nature of the work;
* the possibility of obtaining the work within a reasonable time at an ordinary price;
* the effect of the dealing on the value of the work; and
* where only a part of the work is copied, the amount and substantiality of the portion copied, taken in relation to the whole.

Art museums should note that they cannot rely on "fair dealing" for the purpose of including copyright material in advertising, the annual report, brochures or catalogues.

(e) Use of an insubstantial portion
To be an infringement, the use must be a reproduction of a substantial portion of the work. Of course what is substantial is a question of fact and degree in every case. There are no valid rules of thumb although one often hears glib and reassuring little phrases such as, “You only need to change a line or a colour here and there”. This is not true.

(f) Use in judicial proceedings or legal advice

The copyright in an artistic work is not infringed by anything done for the purposes of a judicial proceeding, or of a report of such proceedings. Nor will a fair dealing with an artistic work for the purpose of giving professional advice by a lawyer or patent attorney, constitute an infringement: s. 43.

(g) Use in places of education, public museums and libraries

There are various provisions which permit these institutions to reproduce artistic works without infringing the copyright in them. All of these exceptions are strictly limited by the Act. They are also the subject of extensive memos in such institutions and so they are not discussed here.

(h) Disclaimers

It is often very difficult to obtain the permission of the copyright owner. They change address, die and do all sorts of things designed to make the would-be licensee's life a misery. If the copyright owner cannot be traced or refuses to reply to one's requests, it is no defence to include a statement saying that all reasonable efforts were made to obtain the copyright permissions. It is simply an indication of bona fides.

8. Remedies
When a copyright is infringed, remedy may be sought by the party who has the exclusive legal right to do the act complained of; this may be the artist, or where appropriate, may be the assignee or the exclusive licensee. The following civil remedies may be available.

(a) Injunction

This is an order of the court forbidding the threatened infringement or the continued infringement of a copyright. It can be obtained quickly and should be sought as soon as an ongoing infringement or threatened infringement is discovered: s. 115(2) (see Fraser v. Evans [1969] 1 Q.B. 349; Beecham Group Ltd v. Bristol Laboratories Pty Ltd (1968) 118 C.L.R. 618 at 622; Shercliff v. Engadine Acceptance Corporation Pty Ltd [1978] 1 N.S.W.L.R. 729).

(b) Damages

In addition to an injunction, the court may award damages to compensate the copyright owner for the loss suffered as a result of the defendant's infringement: Interfirm Comparison (Australia) Pty Ltd v. Law Society of New South Wales (1974-1975) 6 A.L.R. 445.

The court may also award additional damages when it sees fit; e.g. when the infringement is flagrant, vexatious, or perhaps causes severe mental or emotional stress: s. 115(4); see Williams v. Settle [1960] 1 W.L.R. 1072; Ravenscroft v. Herbert and New English Library Ltd [1980] R.P.C. 193; Concrete Systems Pty Ltd v. Devon Symonds Holdings Ltd (1978) 20 A.L.R. 677. (As to pleading, see P. J. Holdings Australia Pty Ltd v. Hughes (1979) 25 A.L.R. 538.)

(c) Account of profits

This remedy does not seek to compensate the copyright owner for loss suffered, but rather, requires the defendant to reveal how much money was derived from the breach and, where appropriate, pay those profits to the rightful copyright owner.
(d) Conversion or detinue

Whilst the damages in (b) compensate the owner for the infringement of an exclusive right, this is an old procedure by which the owner receives damages for the loss of the infringing copies already disposed of and, more importantly, delivery up of the remaining copies: s. 116 (see further, Lahore, Intellectual Property Law in Australia (Butterworths, Sydney, 1988), para. 4.15.310).

e) Anton Pillar orders

These orders provide a means by which plaintiffs can enter the premises of a proposed defendant for the purpose of searching for, and taking possession of material relating to the plaintiff’s claim. It can even extend to forcing the intended defendant to reveal other relevant information such as the whereabouts of such material or the names and addresses of persons with whom the defendant has had dealings with respect to the plaintiff's copyrights. It is granted only in limited circumstances, usually when there is a real fear that evidence will be destroyed. (See further, Simpson, Bailey and Evans, “Discovery and Interrogatories”, Butterworths, Sydney, 1984).

(f) Protection against false attribution of authorship

The Copyright Act also provides some protection against the false attribution of authorship. This subject is dealt with in Chapter 8, “Moral Rights”.

9. International Protection of Copyright

There are two principal copyright conventions relevant to visual artists, the Berne Convention and the Universal Copyright Convention. Australia is a signatory of both. This means that artworks of Australian artists can enjoy copyright protection in countries
which are signatories of these conventions, and, reciprocally, works of artists from these countries can receive protection from copyright infringement within Australia.

The list of convention countries and the degree of protection that each offers, is constantly changing. Artists who fear that the copyright in their work is being infringed in an overseas country should contact the Australian Copyright Council for further advice. Professional legal assistance will invariably be advisable if active preventative or remedial action is desirable.

10. Copyright and Contemporary Art Practice

Developments in the law of copyright have almost always followed developments in technology. The ready availability of the printing press gave the impetus to its introduction and since that time it has slowly evolved to cater for the needs created by new technologies such as film, sound recordings, photocopiers and most recently, computers. It does not develop as readily to meet the needs of the authors of works, in particular visual artists.

For this reason, it is hardly surprising that the breach of copyright is inherent in many forms of contemporary art practice. Perhaps the most obvious example of this is image appropriation. The exponents of this take the images of works by earlier artists and quote them (sometimes verbatim), the difference being, not in the visual form but rather the intellectual intent of those images. Copyright does not recognise such nuances of artistic intent. The photocopier has become a commonplace tool of visual artists but the laws of copyright have not evolved apace.

Similarly the performance artist remains unprotected by copyright. Although there have been recent attempts to introduce "performers' protection" legislation in Australia (thanks primarily to the lobbying power of Actors Equity), performance artists have had no protection from unauthorised reproduction of their work. A Bill which, at the time of
writing, is before federal parliament may, at last, rectify this situation. The sustained lobbying for change has created a political impetus for such reform.